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Supreme Court of the United States.

OCTOBER TERM, 1962

No. 134

DAVID NAMET,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JOHN H. FITZGERALD,
Attorney for Petitioner.

1 State Street,
Boston 9, Mass.

Supreme Court of the United States.

DAVID NAMET,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

1. The petitioner was convicted after a jury trial in the United States District Court for the District of Massachusetts of engaging in the business of accepting wagers without having registered and without having had or paid the special occupational tax imposed by 26 U.S.C. 4411, 4412 and 7203. An appeal was heard by the United States Court of Appeals for the First Circuit, which, after argument on briefs, *per curiam,* entered judgment affirming the verdict and judgment of the District Court.

2. The petitioner petitions for a writ of certiorari contending that the United States Circuit Court of Appeals for the First Circuit in its *per curiam* decision dated and entered April 23, 1962, sustaining the verdict of the District Court dated October 4, 1961, upon which judgment was entered on October 31, 1961, is in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *United States* v. *Maloney,* 262 F. 2d 535 (1959), on the same matter, which, under Rule 19 of the Rules of Supreme Court of the United States, is sufficient to confer jurisdiction upon this Honorable Court.

3. The question specifically presented for the review of this Honorable Court is that the United States District Court for the District of Massachusetts erred in permitting, over the petitioner's repeated objections, Irving Kahn and Annette Kahn, a husband and wife who had pleaded guilty in a similar but separate case involving the same crime, to testify, when the Court and the prosecution knew in advance that both witnesses had been apprised of their rights by counsel and also knew in advance of both witnesses' taking the witness-stand that the witnesses would claim their privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States.

4. The petitioner was arrested in his home on March 19, 1960, by a United States Marshal, accompanied by several Special Agents of the Internal Revenue Service. Prior to this time agents of the Internal Revenue Service had the petitioner under surveillance on several occasions, observing each time that the petitioner was at the same variety or cigar store or his house at approximately the same time of day, travelling, when weather permitted, by automobile, all the time attired in a knee-length overjacket with patch pockets on either side. He remained in each establishment from fifteen seconds to two minutes. Among the establishments he was sometimes observed visiting was a variety store operated by the aforementioned Kahns. No agent could testify that he had ever seen the petitioner receive a wager, or place a wager for that matter, even though the places he visited were alleged to have a reputation for accepting wagers. The petitioner had no proprietary interest in any of these establishments.

At the trial, over the objections of the petitioner's counsel, who was also counsel for the Kahns, the Court allowed the Government to summon both Kahns to the witness-stand, knowing that they intended to plead the privilege

of the Fifth Amendment. In most occasions the Court sustained the Kahns' invocation of the privilege and disallowed the Government's question in front of the jury, which subsequently returned a verdict of guilty of violation of provisions of Title 26 of the United States Code.

5. As argument in the petitioner's behalf, in *United States v. Maloney*, 262 F. 2d 535, 537 (1959), Judge Learned Hand stated:

> "When the witness claims his privilege, a natural, indeed an almost inevitable inference arises as to what would have been his answer if he had not refused. If the prosecution knows when it puts the question that he will claim the privilege it is charged with notice of the probable effect of his refusal in the jury's mind. . . . if they once do get before the jury, there arises . . . . a strong probability that they will be taken as evidentiary. . . . The interest of the accused should prevail over that of the prosecution and the judgment should not stand, for the question touched vital elements of the charge."

While the Kahns had pleaded guilty of the same offense with which the petitioner was charged, forcing them to take the witness-stand under the circumstances recited exposed them to further conceivable indictments, viz., conspiracy to violate these and other sections of the United States Code, possible bribery of a federal official, etc.

6. For the reasons herein specified, it is respectfully submitted that this Honorable Court should grant the petitioner a writ of certiorari.

Respectfully submitted,

JOHN H. FITZGERALD,
Attorney for the petitioner.